

## **V. PROCEDURAL, PAYMENT AND PENALTY ISSUES**

### **A. Pre-Auction Application Procedures**

58. In the Second Report and Order, the Commission established general competitive bidding rules and procedures which we noted may be modified on a service-specific basis. See 47 C.F.R. Part 1, subpart Q. As discussed below, we will generally follow the procedural, payment and penalty rules established in the Second Report and Order with certain minor modifications designed to address the particular characteristics of the broadband PCS service. These rules are structured to ensure that bidders and licensees are qualified and will be able to construct systems quickly and offer service to the public. By ensuring that bidders and license winners are serious, qualified applicants, these rules will minimize the need to re-auction licenses and prevent delays in the provision of broadband PCS service to the public. In addition, as we proposed in the Notice at ¶ 129, we adopt general procedural and processing rules based on Part 22 of the Commission's Rules.

59. Section 309(j)(5) provides that no party may participate in an auction "unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing." 47 U.S.C. § 309(j)(5). Moreover, "[n]o license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to [Section 309(a)] and Sections 308(b) and 310" of the Communications Act. Id. As the legislative history of Section 309(j) makes clear, the Commission may require that bidders' applications contain all information and documentation sufficient to demonstrate that the application is not in violation of Commission rules, and applications not meeting those requirements may be dismissed prior to the competitive bidding. See H.R. Rep. No. 111, 103d Cong., 1st Sess. 258 (1993) (H.R. Rep. No. 103-111).

60. In the NPRM, we proposed that all parties interested in participating in an auction for spectrum licenses would be required to file a short-form application (modeled on the Commission's "Transmittal Sheet for Cellular Applications"), and asked whether applicants should also be required to submit a long-form application prior to the auction, or whether the long-form application should be submitted subsequent to the auction. NPRM at ¶ 97. The comments generally agreed that we should require only a short-form application prior to competitive bidding, and that only winning bidders should be required to submit a long-form license application after the auction. Because we believed that such a procedure would fulfill the statutory requirements and objectives and adequately protect the public interest, we incorporated these requirements into the rules adopted in the Second Report and Order. See 47 C.F.R. §§ 1.2105 and 1.2107. We will extend the application of these rules to the competitive bidding process for broadband PCS.

61. We will be guided by the following procedures in conducting broadband PCS auctions. The Commission will release an initial Public Notice announcing that it will accept applications for specific broadband PCS licenses. This initial Public Notice will specify the

licenses and identify the time and place of an auction in the event that mutually exclusive applications are filed. The Public Notice also will specify the method of competitive bidding to be used, including applicable bid submission procedures, stopping rules and activity rules, as well as the deadline by which short-form applications must be filed, and the amounts and deadlines for submitting the upfront payment. See Second Report and Order at ¶ 164. We will not accept applications filed before or after the dates specified in Public Notices. Applications submitted before release of a Public Notice announcing the availability of particular license(s), or before the opening date of the filing window specified therein, will be returned as premature. Applications submitted after the deadline specified by Public Notice will be dismissed, with prejudice, as untimely. Soon after release of the initial Public Notice, an auction information package will be made available to prospective bidders.

62. Bidders will be required to submit short-form applications on FCC Form 175 (and FCC Form 175-S, if applicable), together with any applicable filing fee<sup>38</sup> by the date specified in the initial Public Notice.<sup>39</sup> The short-form applications will require applicants to provide the information required by Section 1.2105(a)(2) of the Commission's Rules, 47 C.F.R. § 1.2105(a)(2). Specifically, each applicant will be required to specify on its Form 175 applications certain identifying information, including its status as a designated entity (if applicable), its classification (*i.e.*, individual, corporation, partnership, trust or other), the markets and frequency blocks for which it is applying, and assuming that the licenses will be auctioned, the names of persons authorized to place or withdraw a bid on its behalf. In addition, applicants will be required to provide detailed ownership information (see Section 24.813(a) of the Commission's Rules, contained in Appendix B hereto) and identify all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate to the competitive bidding process. Applicants will also be required to certify that they have not entered and will not enter into any explicit or implicit agreements, arrangements or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid. In addition, applicants for licenses in the

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<sup>38</sup> Because Section 8 of the Communications Act, 47 U.S.C. § 158, does not currently afford the Commission authority to charge an application fee in connection with PCS applications, broadband PCS applicants will not be required to submit a fee with their short-form application. However, the Commission has requested that Congress amend Section 8 of the Communications Act to provide a specific application fee for PCS services. If the Commission receives application fee authority, the general rules governing submission of fees will apply. See 47 C.F.R. § 1.1101 *et seq.* These rules currently provide for dismissal of an application if the application fee is not paid, is insufficient, is in improper form, is returned for insufficient funds or is otherwise not in compliance with our fee rules. Whenever funds are remitted to the Commission, applicants also must file FCC Form 159.

<sup>39</sup> Applicants should submit one paper original and one microfiche original of their application, as well as two microfiche copies.

entrepreneurs' blocks will be required, as part of their short-form applications, to certify that they are eligible to bid on and win licenses in those blocks. Among other things, this means that they are in compliance with our PCS-cellular and PCS-PCS cross-ownership limitations. As we indicated in the Second Report and Order, if the Commission receives only one application that is acceptable for filing for a particular license, and thus there is no mutual exclusivity, the Commission by Public Notice will cancel the auction for this license and establish a date for the filing of a long-form application, the acceptance of which will trigger the procedures permitting petitions to deny. See Second Report and Order at ¶ 165.

63. A number of commenters in this proceeding objected to our original tentative conclusion that short-form applications should be judged by a letter-perfect standard. See NPRM at ¶ 100. Parties proposed that the Commission allow a brief period for correcting errors in short-form applications. See, e.g., comments of AT&T at 30-31, BellSouth at 36-37. As we stated in the Second Report and Order, we believe that the public interest would be better served by encouraging maximum bidder participation in auctions. See Second Report and Order at ¶ 167. Therefore, we will provide applicants with an opportunity to correct minor defects in their short-form applications (e.g., typographical errors, incorrect license designations, etc.) prior to the auction. Applicants will not be permitted until after the auction, however, to make any major modifications to their applications, including cognizable ownership changes or changes in the identification of parties to bidding consortia. In addition, applications that are not signed will be dismissed as unacceptable.

64. After reviewing the short-form applications, the Commission will issue a second Public Notice listing all defective applications, and applicants whose applications contain minor defects will be given an opportunity to cure defective applications and resubmit a corrected version.<sup>40</sup> After reviewing the corrected applications, the Commission will release a third Public Notice announcing the names of all applicants whose applications have been accepted for filing. These applicants will be required to submit an upfront payment to the Commission, as discussed below.

## **B. Upfront Payment**

65. The comments in this proceeding generally supported the Commission's proposal to require prospective bidders to make substantial upfront payments prior to auction. See, e.g., comments of Comcast at 18, PacBell at 28, Nextel at 16, and AWCC at 31-32. Consistent with the weight of the comments, we concluded in the Second Report and Order that a substantial upfront payment prior to the beginning of an auction is necessary to ensure that only serious and qualified bidders participate. See Second Report and Order at ¶ 171. By requiring such a payment we also help to ensure that any bid withdrawal or default penalties are paid. These considerations apply to broadband PCS auctions. We will therefore

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<sup>40</sup> On the date set for submission of corrected applications, applicants that on their own discover minor errors in their applications also will be permitted to file corrected applications.

require all broadband PCS auction participants to tender in advance to the Commission a substantial upfront payment as a condition of bidding.

66. In the Notice, we proposed to require upfront payments based on a \$0.02 per MHz per pop formula. Though some commenters favor a fixed upfront payment set by the Commission prior to the auction,<sup>41</sup> most support the Commission's proposed \$0.02 per MHz per pop formula, which would enable prospective bidders to tailor their upfront payment to their bidding strategies.<sup>42</sup> Commenters suggest that there should be some fixed minimum on the amount of upfront payment made prior to auction (suggestions range from \$2,500 to \$100,000 for different services).<sup>43</sup> Some commenters also favor setting a maximum upfront payment, pointing out that our proposed formula yields very high payments in the broadband PCS context.<sup>44</sup>

67. We believe that the standard upfront payment formula of \$0.02 per pop per MHz for the largest combination of MHz-pops a bidder anticipates bidding on in any single round of bidding is appropriate for broadband PCS services.<sup>45</sup> Using this formula will provide bidders with the flexibility to change their strategy during an auction and to bid on a larger number of smaller licenses or a smaller number of larger licenses, so long as the total MHz-pops combination does not exceed that amount covered by the upfront payment. For example, when we auction licenses covering the nation simultaneously, a bidder would not be required to file an upfront payment representing national coverage unless it intended to bid on licenses covering the entire nation in a single bidding round. The \$0.02 per MHz per pop formula also works well with the Milgrom-Wilson activity rule that we plan to employ in broadband PCS auctions, as described in Section III above. In the initial Public Notice issued prior to each auction, we will announce population information corresponding to each license to enable bidders to calculate their upfront payments.

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<sup>41</sup> See, e.g., comments of Edward M. Johnson at 2; and LuxCel Group, Inc. at 8.

<sup>42</sup> See, e.g., comments of PacBell at 28; Telocator (now PCIA) at 13; CTIA at 30; and Rochester Telephone Corporation at 13.

<sup>43</sup> See, e.g., comments of Telocator at 20-21; Cellular Communications, Inc. at 15; AT&T at 34; and BellSouth at 41.

<sup>44</sup> See, e.g., comments of Southwestern Bell at 38-40 (arguing generally for a maximum deposit of \$50 million for all markets) and AT&T at 34 (supporting a maximum upfront payment of \$5 million, with a down payment following the auction).

<sup>45</sup> As discussed in Section VII, *infra*, designated entities will be subject to a lesser upfront payment requirement of \$0.015 per MHz per pop. Further, we retain the flexibility to consider using a simpler payment requirement if circumstances warrant.

68. As we indicated in the Second Report and Order, we will not set a maximum on upfront payments.<sup>46</sup> We decline to do so because we wish to ensure that those bidding on large numbers of valuable broadband PCS licenses are bidding in good faith and are financially capable of constructing those systems quickly. We recognize that upfront payments for broadband PCS licenses may amount to millions of dollars, but we do not believe that it is unreasonable to expect prospective bidders to tender such sums given the expected overall value of some of these licenses and the expected financial requirements to construct the systems. Indeed, such a requirement is necessary to ensure the seriousness of bidders for these valuable licenses.

69. In the Second Report and Order, we accepted commenters' suggestions and established a general minimum upfront payment of \$2,500 to ensure that the use of our preferred formula would result in a substantial enough payment that bidders would be deterred from making frivolous bids.<sup>47</sup> Such a minimum upfront payment is needed in connection with auctions where the \$0.02 per MHz per pop formula would yield a comparatively small upfront payment (such as those for narrowband PCS licenses in BTAs). Because of the wider bandwidth of broadband PCS licenses, however, this minimum upfront payment will not be relevant in auctions for this service.<sup>48</sup>

70. For broadband PCS auctions, we will follow the procedures for submission of upfront payments outlined in the Second Report and Order. Applicants whose short-form applications have been accepted for filing will be required to submit the full amount of their upfront payment to the Commission's lock-box bank by a date certain, which will be announced in a Public Notice and generally will be no later than 14 days before the scheduled auction.<sup>49</sup> After the Commission receives from its lock-box bank the names of all applicants who have submitted timely upfront payments, the Commission will issue a Public Notice announcing the names of all applicants that have been determined to be qualified to bid. An applicant who fails to submit a sufficient upfront payment to qualify it to bid on any license being auctioned will not be identified on this Public Notice as a qualified bidder, and it will

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<sup>46</sup> See Second Report and Order at ¶ 179.

<sup>47</sup> Id. at ¶ 180.

<sup>48</sup> The smallest bandwidth that a broadband PCS licensee will be authorized to use is 10 MHz, so a \$2,500 upfront payment would result for a license area with a population of only 12,500 persons. The least populous BTA in the United States (Williston, North Dakota) has a population of approximately 27,500, and the upfront payment for a 10 MHz license in that BTA would be approximately \$5,500.

<sup>49</sup> Upfront payments must be made by wire transfer or by cashier's check drawn in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission.

be prohibited from bidding in the auction. That is, we will require that applicants for broadband PCS licenses submit a sufficient upfront payment to reflect the MHz-pops of the smallest license being put up for bid in a particular auction.<sup>50</sup>

71. Although it would be simpler to require the submission of upfront payments at the same time short-form applications are filed, we agree with those commenters that argued that they should not be required to commit the large sums that will likely be involved in broadband PCS upfront payment for longer than is necessary. Accordingly, applicants will not be required to tender upfront payments with their short-form applications. Instead, as noted above, upfront payments will be due by a date specified by Public Notice, but generally no later than 14 days before a scheduled auction. This period should be sufficient to allow the Commission adequate time to process upfront payment data and release a Public Notice listing all qualified bidders, but not so long as to impose undue burdens upon bidders. The rules set forth in Section 1.2106 of the Commission's Rules concerning upfront payments will be applicable in broadband PCS auctions. Each qualified bidder will be issued a bidder identification number and further information and instructions regarding the auction procedures. During an auction, bidders will be required to provide their bidder identification numbers when submitting bids.

### **C. Payment and Procedures for Licenses Awarded by Competitive Bidding**

#### **1. Down Payment**

72. The Second Report and Order established a 20 percent down payment by winning bidders to discourage default between the auction and licensing and to ensure payment of the penalty if such default occurs. We concluded that a 20 percent down payment was appropriate to ensure that auction winners have the necessary financial capabilities to complete payment for the license and to pay for the costs of constructing a system, while at the same time not being so onerous as to hinder growth or diminish access. Most of the commenters addressing this issue generally support our proposal that winning bidders increase their deposits with the Commission up to an amount equalling 20 percent of their winning bid or bids. See, e.g., comments of BellSouth at 43-44, PageNet at 35-36, and Telocator at 13. Some commenters feel that a 20 percent down payment requirement would be too high. See comments of Sprint at 18 (prefers a 10 percent down payment).

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<sup>50</sup> For example, in our first broadband PCS auction (the 30 MHz MTA licenses on blocks A and B), the smallest upfront payment that may be submitted to qualify an applicant to bid will be calculated by multiplying the population of the least populous MTA (American Samoa: population 47,000) times 30 times two cents, or \$28,200. It should be noted, however, that this minimal upfront payment will entitle the bidder to bid only on a license to serve American Samoa.

73. We believe that the reasoning that led us to conclude that 20 percent is the appropriate down payment applies to broadband PCS auctions. We therefore will require that, with the exception of bidders eligible for installment payments in the entrepreneurs' blocks (see Section VII, *infra*), winning bidders in broadband PCS auctions supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s).<sup>51</sup> Winning bidders will be required to submit the required down payment by cashier's check or wire transfer to our lock-box bank by a date to be specified by Public Notice, generally within five (5) business days following the close of bidding. All auction winners will generally be required to make full payment of the balance of their winning bids within five (5) business days following award of the license. Grant of the license will be conditioned on this payment.

74. An auction winner that is eligible to make payments through an installment plan (see Section VII, *infra*) will be subject to different payment requirements. Such an entity will be required to bring its deposits with the Commission up to only 5 percent of its winning bid after the bidding closes, and will pay an additional 5 percent of its winning bid to the Commission after a license is granted.

## **2. Bid Withdrawal and Default Penalties**

75. As we discussed in the Second Report and Order, it is critically important to the success of our system of competitive bidding that potential bidders understand that there will be a substantial penalty assessed if they withdraw a high bid, are found not to be qualified to hold licenses or default on payment of a balance due. There was substantial support in the comments for the notion that the Commission is authorized to and should order forfeiture of upfront and down payments if the auction winner later defaults or is disqualified. See, e.g., comments of CTIA at 29-30, AT&T at 35, n.43, PageNet at 35-36, Cook Inlet at 47, and BellSouth at 42-44. We concluded, however, that forfeiture of all amounts that a bidder may have on deposit with the Commission may, in some circumstances, be too severe a penalty and would not necessarily be rationally related to the harm caused by withdrawal, default or disqualification. See Second Report and Order at ¶ 197.

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<sup>51</sup> If the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal and default penalties due, amounts to 20 percent or more of its winning bids, no additional deposit will be required. If the upfront payment amount on deposit is greater than 20 percent of the winning bid amount after deducting any bid withdrawal and default penalties due, the additional monies will be refunded. If a bidder has withdrawn a bid or defaulted but the amount of the penalty cannot yet be determined, the bidder will be required to make a deposit of 20 percent of the amount bid on such licenses. When it becomes possible to calculate and assess the penalty, any excess deposit will be refunded. Upfront payments will be applied to such deposits and to bid withdrawal and default penalties due before being applied toward the bidder's down payment on licenses the bidder has won and seeks to acquire.

76. This logic applies to broadband PCS auctions, so for these auctions we will employ the bid withdrawal, default and disqualification penalties adopted in the Second Report and Order, which are reflected in Sections 1.2104(g) and 1.2109 of the Commission's Rules. Any bidder who withdraws a high bid during an auction before the Commission declares bidding closed will be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if this subsequent winning bid is lower than the withdrawn bid.<sup>52</sup> No withdrawal penalty will be assessed if the subsequent winning bid exceeds the withdrawn bid. After bidding closes, a defaulting auction winner (*i.e.*, a winner who fails to remit the required down payment within the prescribed time, fails to pay for a license, or is otherwise disqualified) will be assessed an additional penalty of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less. See 47 C.F.R. §§ 1.2104(g) and 1.2109. The additional three percent penalty is designed to encourage bidders who wish to withdraw their bids to do so before bidding ceases. We will hold deposits made by defaulting or disqualified auction winners until full payment of the penalty.<sup>53</sup> We believe that these penalties will adequately discourage default and ensure that bidders have adequate financing and that they meet all eligibility and qualification requirements. As we explained in the Second Report and Order, we further believe that this approach is well within our authority under both Section 309(j)(4)(B) and Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), as it is clearly necessary to carry out the rapid deployment of new technologies through the use of auctions.<sup>54</sup>

77. In addition, if a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it deems

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<sup>52</sup> If a license is re-offered by auction, the "winning bid" refers to the high bid in the auction in which the license is re-offered. If a license is re-offered in the same auction, the winning bid refers to the high bid amount, made subsequent to the withdrawal, in that auction. If the subsequent high bidder also withdraws its bid, that bidder will be required to pay a penalty equal to the difference between its withdrawn bid and the amount of the subsequent winning bid the next time the license is offered by the Commission. If a license which is the subject of withdrawal or default is not re-auctioned, but is instead offered to the highest losing bidders in the initial auction, the "winning bid" refers to the bid of the highest bidder who accepts the offer. Losing bidders would not be required to accept the offer, *i.e.*, they may decline without penalty. We wish to encourage losing bidders in simultaneous multiple round auctions to bid on other licenses, and therefore we will not hold them to their losing bids on a license for which a bidder has withdrawn a bid or on which a bidder has defaulted.

<sup>53</sup> In rare cases in which it would be inequitable to retain a down payment, we will entertain requests for waiver of this provision.

<sup>54</sup> See Second Report and Order at ¶ 198.



necessary, including institution of proceedings to revoke any existing licenses held by the applicant. See Second Report and Order at ¶ 198.

### **3. Re-Offering Licenses When Auction Winners Default**

78. In the event that an auction winner defaults or is otherwise disqualified, the Commission must determine whether to hold a new auction or simply offer the license to the second-highest bidder. Parties commenting on this issue generally favored re-auctioning the license, pointing out that changing market and even technological developments since the initial auction may change the amounts that bidders are willing to pay for a license, especially if the intervening period is relatively long. They urge that any re-auction be open to new bidders, arguing that such a procedure would reduce the incentive of losing bidders to file unmeritorious petitions to deny against the auction winner. See, e.g., comments of BellSouth at 37, Utilities Telecommunications Council at 21.

79. As we stated in the Second Report and Order, we believe that, as a general rule, when an auction winner defaults or is otherwise disqualified after having made the required down payment, the best course of action is to re-auction the license. See Second Report and Order at ¶ 204. Although we recognize that this may cause a brief delay in the initiation of service to the public, during the time between the original auction and the disqualification circumstances may have changed so significantly as to alter the value of the license to auction participants as well as to parties who did not participate. In this situation, awarding licenses to the parties that value them most highly can best be assured through a re-auction. However, if the default occurs within five (5) business days after the bidding has closed, the Commission retains the discretion to offer the license to the second highest bidder at its final bid level, or if that bidder declines the offer, to offer the license to other bidders (in descending order of their bid amounts) at the final bid levels.<sup>55</sup>

80. If a new auction becomes necessary because of default or disqualification more than five (5) business days after bidding has ended, the Commission will afford new parties an opportunity to file applications. One of our primary goals in conducting auctions is to assure that all serious interested bidders are in the pool of qualified bidders at any re-auction. We believe that allowing new applications will promote achievement of this goal, which outweighs the short delay that we recognize may result from allowing new applications in a re-auction. Indeed, if we were not to allow new applicants in a re-auction, interested parties might be forced into an after-market transaction to obtain the license, which would itself delay service to the public and may prevent the public from recovering a reasonable portion of the value of the spectrum resource.

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<sup>55</sup> If only a small number of relatively low-value licenses are to be re-auctioned and only a short time has passed since the initial auction, the Commission may choose to offer the license to the highest losing bidders because the cost of running another auction may exceed the benefits.

#### **4. Long-Form Application**

81. If the winning bidder makes the down payment in a timely manner, a long-form application filed on FCC Form 401 (as modified), or such other form as may be adopted for Commercial Mobile Radio Service use in GEN Docket No. 93-252, will be required to be filed by a date specified by Public Notice, generally within ten (10) business days after the close of bidding.<sup>56</sup> After the Commission receives the winning bidder's down payment and the long-form application, we will review the long-form application to determine if it is acceptable for filing. In addition to the information required in the long-form application of all winning bidders, each winning bidder on licenses in frequency blocks C and F will be required to submit evidence of its eligibility to bid on licenses in these blocks, as well as evidence to support its claim to any special provisions made available to designated entities. This information may be included in an exhibit to FCC Form 401, and must include the gross revenues and total assets of the applicant and all attributable investors in the applicant, and a certification that the personal net worth of each individual investor does not exceed the eligibility limitation. This information will enable the Commission, and other interested parties, to ensure the validity of the applicant's certification of eligibility to bid in blocks C and F (submitted as part of its FCC Form 175) and its eligibility for any bidding credits, installment payment options, or other special provision. Upon acceptance for filing of the long-form application, the Commission will issue a Public Notice announcing this fact, triggering the filing window for petitions to deny. If the Commission denies all petitions to deny, and is otherwise satisfied that the applicant is qualified, the license(s) will be granted to the auction winner.

#### **5. Processing and Procedural Rules**

82. In the Notice, we proposed to adopt general processing and procedural rules for broadband PCS based on Part 22 of the Commission's Rules. One commenter, AIDE, argues that the Commission's reference to proposed PCS rules is vague and legally insufficient for a Notice of Proposed Rule Making. Comments of AIDE at 16-17. AIDE also asserts that the adoption of PCS processing and procedural rules is beyond the scope of the Notice in this

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<sup>56</sup> Schedule B to FCC Form 401 will not be required to be submitted by broadband PCS applicants. However, applicants for broadband PCS licenses proposing to use any portion of broadband PCS spectrum to offer service on a private mobile radio service basis must overcome the presumption that PCS is a commercial mobile radio service. Regulatory Treatment of Mobile Services, Second Report and Order in GEN Docket No. 93-252, 9 FCC Rcd 1411, 1460-63 (1994); 47 C.F.R. § 20.9(a)(11), (b). Applicants (or licensees) seeking to dedicate a portion of the spectrum for private mobile radio service will be required to attach as an exhibit to the Form 401 application a certification that it will offer PCS service on a private mobile radio basis. The certification must include a description of the proposed service sufficient to demonstrate that it is not within the definition of commercial mobile radio service in Section 20.3 of the Commission's Rules. Id.

rule making proceeding. Id. We disagree. The Notice sought comment on specific rule sections contained in Part 22 of our Rules and asked commenters to indicate what modifications should be made to those rules to adapt them for PCS services. See Notice at ¶ 128. In addition, the Notice specifically requested comment on the general procedural, processing and petition to deny procedures that should be used for auctionable services. The Notice's proposal to adopt processing rules based on Part 22 of the Commission's Rules, with any appropriate modifications for PCS services, clearly indicated to commenters the terms of the proposed rules, as is required by 5 U.S.C. § 553 and 47 C.F.R. § 1.413(c). Accordingly, we believe that the Notice's description of the proposed rules was sufficiently specific to alert interested parties to the substance of our proposal and to provide an adequate opportunity for comment on those proposals. Moreover, we conclude that these issues are well within the scope of the Notice.

83. As we proposed, we adopt for broadband PCS a modified version of the application processing rules contained in Part 22 of the Commission's Rules. These rules, which will comprise Subpart I of Part 24 of our Rules, will govern application filing and content requirements, waiver procedures, procedures for return of defective applications, regulations regarding modification of applications, and general application processing rules. We also adopt petition to deny procedures based on Section 22.30 of the Commission's Rules. In addition, as we proposed in the Notice, we adopt rules similar to Sections 22.927, 22.928 and 22.929 of our existing rules (47 C.F.R. §§ 22.927, 22.928, 22.929) to prevent the filing of speculative applications and pleadings (or threats of the same) designed to extract money from sincere broadband PCS applicants. In this regard, we limit the consideration that an applicant or petitioner is permitted to receive for agreeing to withdraw an application or a petition to deny to the legitimate and prudent expenses of the withdrawing applicant or petitioner. These rules are included in Appendix B.

84. With regard to petitions to deny, we adopt expedited procedures consistent with the provisions of Section 309(i)(2) of the Communications Act to resolve substantial and material issues of fact concerning qualifications.<sup>57</sup> This provision requires us to entertain petitions to deny the application of the auction winner if petitions to deny are otherwise provided for under the Communications Act or our Rules.

85. As we indicated in the Second Report and Order, the Commission need not conduct a hearing before denying an application if it determines that an applicant is not qualified and no substantial issue of fact exists concerning that determination. See Second Report and Order at ¶ 202. In the event that the Commission identifies substantial and material issues of fact in need of resolution, Section 309(i)(2) of the Communications Act permits in any hearing the submission of all or part of evidence in written form and allows

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<sup>57</sup> The adoption of such procedures is necessary because Section 309(j)(5) of the Communications Act forbids the granting of licenses through competitive bidding unless the Commission determines that the applicant is qualified.

employees other than administrative law judges to preside over the taking of written evidence. We will incorporate these principles into our broadband PCS procedural rules.

#### **D. Procedures in Alternative Auction Design**

86. If we decide to employ a sequential auction design (using either oral or electronic bid submission), the same general rules and procedures described above will be used with certain modifications to fit the oral or electronic auction format. In the case of oral auctions, bidders would be required to follow the procedures described above, including the submission of the standard upfront payment of \$0.02 per MHz-pop prior to the auction. Applicants would submit a sufficient upfront payment to cover the total number of MHz-pops they desire to win. Once a bidder has won the maximum number of MHz-pops covered by its upfront payment, that bidder will be precluded from further bidding in the auction.<sup>58</sup> Immediately after bidding closes on a license, the winning bidder (*i.e.*, the high bidder on a license on which bidding has closed) will be asked to sign a bid confirmation form. No other license will be put up for bid until a bid confirmation form is signed by a high bidder on the previous license.<sup>59</sup> Because we recognize that in an oral auction the chances of a bidder accidentally placing a high bid are greater than in other auction methods, and because the harm will be limited if the license is immediately re-offered, we will not impose a penalty on a high bidder who withdraws a high bid by refusing to sign the bid confirmation form. Thus, in an sequential oral auction in which a high bidder declines to sign the bid confirmation form, the license will be immediately put up for bid again. If, however, a high bidder signs a bid confirmation form but subsequently fails to submit the 20 percent down payment or otherwise defaults, the standard default penalties (described *supra*) will apply.<sup>60</sup>

87. If we decide to use sequential electronic bidding, bidders would again follow the general procedures described above including the submission of the standard upfront payment amount of \$0.02 per MHz per pop prior to the auction. Applicants would submit a sufficient upfront payment to cover the total number of MHz-pops they desire to win. An applicant will not be eligible to bid on a license for which it has not applied or which contains more MHz-pops than the total MHz-pops covered by the bidder's upfront payment less any MHz-pops already won by that bidder. Once a bidder has won licenses representing the maximum number of MHz-pops reflected in its upfront payment, that bidder will be precluded from further bidding in the auction. Each bidder's eligibility will be computed and

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<sup>58</sup> This is similar to the procedure adopted in the Fourth Report and Order for the oral auctioning of IVDS licenses. *See* Fourth Report and Order in PP Docket No. 93-253, 9 FCC Rcd 2330 (released May 10, 1994).

<sup>59</sup> If we use single combined bidding, described *supra*, no other licenses will be put up for bid until a bid confirmation form is signed for each license put up for bid together in a combined auction.

<sup>60</sup> *See* 47 C.F.R. §§ 1.2104 and 1.2109.

tracked by the auction software and bids placed by ineligible bidders will not be accepted. After the auctioneer declares bidding on a license closed and the high bidder has been notified, that bidder will be asked to confirm its high bid. If the high bidder in a sequential electronic auction declines to confirm its high bid, the license will be immediately re-auctioned and no penalty will be imposed. No other licenses will be put up for bid until a bid confirmation form is signed by a high bidder on the previous license.<sup>61</sup> As with sequential oral auctions, if a high bidder signs a bid confirmation form but subsequently fails to submit the 20 percent down payment or otherwise defaults, the standard default penalties (described supra) will apply.

## VI. REGULATORY SAFEGUARDS

### A. Transfer Disclosure Requirements

88. In Section 309(j), Congress directed the Commission to "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits." 47 U.S.C. § 309(j)(4)(E). In the Second Report and Order, the Commission adopted safeguards designed to ensure that the requirements of Section 309(j)(4)(E) are satisfied. See Second Report and Order at ¶¶ 210-226 and 258-265.

89. In the Second Report and Order (at ¶ 214), we stated our belief that it is important to monitor transfers of licenses awarded by competitive bidding in order to accumulate the data necessary to evaluate our auction designs and to judge whether "licenses [have been] issued for bids that fall short of the true market value of the license." H.R. Rep. No. 103-111 at 257. Therefore, we imposed a transfer disclosure requirement on licenses obtained through the competitive bidding process, whether by a designated entity or not. See 47 C.F.R. § 1.2111(a). We believe that the transfer disclosure requirements contained in Section 1.2111(a) of the Commission's Rules should apply to all broadband PCS licenses obtained through the competitive bidding process. Generally, licensees transferring their licenses within three years after the initial license grant will be required to file, together with their transfer applications, the associated contracts for sale, option agreements, management agreements, and all other documents disclosing the total consideration received in return for the transfer of its license. As we indicated in the Second Report and Order, we will give particular scrutiny to auction winners who have not yet begun commercial service and who seek approval for a transfer of control or assignment of their licenses within three years after the initial license grant, in order to determine if any unforeseen problems relating to unjust enrichment have arisen outside the designated entity context. See Second Report and Order at

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<sup>61</sup> See also n. 59, supra.

## **B. Performance Requirements**

90. The Budget Act requires the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."<sup>63</sup> In the Second Report and Order we decided that it was unnecessary and undesirable to impose additional performance requirements, beyond those already provided in the service rules, for all auctionable services. The broadband PCS service rules already contain specific performance requirements, such as the requirement to construct within a specified period of time. See, e.g., 47 C.F.R. § 24.203. Failure to satisfy these construction requirements will result in forfeiture of the license. Accordingly, we do not see the need to adopt any additional performance requirements in this Report and Order.

## **C. Rules Prohibiting Collusion**

91. In the Second Report and Order, we adopted a special rule prohibiting collusive conduct in the context of competitive bidding. See 47 C.F.R. § 1.2105(c). We referred to the Notice, wherein we indicated our belief that such a rule would serve the objectives of the Budget Act by preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and disadvantage other bidders. See Second Report and Order at ¶ 221. We believe that this rule is nowhere more necessary than with respect to broadband PCS auctions, where we expect bidder interest to be high and the incentives to collude to be great. Thus, Section 1.2105(c) will apply to broadband PCS auctions. This rule provides that from the time the short-form applications are filed until the winning bidder has made its required down payment, all bidders will be prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application. In addition, as discussed in Section IV, supra, bidders will be required by Section 1.2105(a)(2) of the Commission's Rules to identify on their Form 175 applications all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate to the competitive bidding process. Bidders will also be required to certify that they have not entered and will

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<sup>62</sup> We note that these transfer disclosure provisions are in addition to the limitations on transfers that we have adopted in the Broadband PCS Reconsideration Order (with respect to spectrum disaggregation) or elsewhere in this Order (with respect to transfers of licenses in the entrepreneurs' blocks).

<sup>63</sup> See Section 309(j)(4)(B) of the Communications Act, as amended.

not enter into any explicit or implicit agreements, arrangements or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid.

92. Winning bidders in broadband PCS auctions will also be subject to Section 1.2107 of the Commission's Rules, which among other things requires each winning bidder to attach as an exhibit to the Form 401 long-form application a detailed explanation of the terms and conditions and parties involved in any bidding consortium, joint venture, partnership, or other agreement or arrangement they had entered into relating to the competitive bidding process prior to the close of bidding. All such arrangements must have been entered into prior to the filing of short-form applications. In addition, where specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, the Commission may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with participation in the auction process may be subject to forfeiture of their down payment or their full bid amount and revocation of their license(s), and they may be prohibited from participating in future auctions.

## **VII. TREATMENT OF DESIGNATED ENTITIES**

### **A. Overview and Objectives**

93. Congress mandated that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). To achieve this goal, the statute requires the Commission to "consider the use of tax certificates, bidding preferences, and other procedures." Thus, while providing that we charge for licenses, Congress has ordered that the Commission design its auction procedures to ensure that designated entities have opportunities to obtain licenses and provide service. For that purpose, the law does not mandate the use of any particular procedure, but it specifically approves the use of "tax certificates, bidding preferences, and other procedures." The use of any such procedure is, in our view, mandated where necessary to achieve Congress's objective of ensuring that designated entities have the opportunity to participate in broadband PCS.

94. In addition to this mandate, the statute sets forth various congressional objectives. For example, it provides that in establishing eligibility criteria and bidding methodologies the Commission shall "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." 47 U.S.C. § 309(j)(3)(B); see also id. §309(j)(4)(C) (requiring the Commission when prescribing area designations and bandwidth

assignments, to promote "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women).<sup>64</sup> Further, Section 309(j)(4)(A) provides that to promote the statute's objectives the Commission shall "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods . . . and combinations of such schedules and methods."

95. To satisfy these statutory mandates and objectives, we established in the Second Report and Order eligibility criteria and general rules that would govern the special measures for small businesses, rural telephone companies, and businesses owned by members of minority groups and women. We also identified several measures, including installment payments, spectrum set-asides, bidding credits and tax certificates, that we could choose from in establishing rules for auctionable spectrum-based services. We stated that we would decide whether and how to use these special provisions, or others, when we developed specific competitive bidding rules for particular services. In addition, we set forth rules designed to prevent unjust enrichment by designated entities who transfer ownership in licenses obtained through the use of these special measures or who otherwise lose their designated entity status.

96. We intend in the new broadband personal communications service to meet fully the statutory mandate of Section 309(j)(4)(D), as well as the objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. As explained more fully in this Order, in some respects it is necessary to do more to ensure that businesses owned by members of minority groups and women have a meaningful opportunity to participate in the provision of personal communications services than is necessary to ensure participation by other designated entities. In particular, we have concluded that steps such as adoption of bidding credits, tax certificates, alternate payment plans and relaxed attribution rules, must be taken to encourage investment in minority and women-owned businesses. These special provisions are tailored to address the major problem facing minorities and women desiring to offer PCS -- lack of access to capital. Moreover, because broadband PCS licenses in many cases are expected to be auctioned for large sums of money in the competitive bidding process, and because build-out costs are likely to be high, it is necessary to do more to ensure that designated entities have the opportunity to participate in broadband PCS than is necessary in

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<sup>64</sup> As noted in the Second Report and Order, the statute also requires the Commission to promote the purposes specified in Section 1 of the Communications Act, which include, among other things, "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151; Second Report and Order at n. 3.



other, less costly spectrum-based services. In our view, these steps and the others we adopt are required to fulfill Congress's mandate that designated entities have the opportunity to participate in the provision of PCS. The measures we adopt today will also increase the likelihood that designated entities who win licenses in the auctions become strong competitors in the provision of broadband PCS service.

97. In instructing the Commission to ensure the opportunity for designated entities to participate in auctions and spectrum-based services, Congress was well aware of the difficulties these groups encounter in accessing capital. Indeed, less than two years ago, Congress made specific findings in the Small Business Credit and Business Opportunity Enhancement Act of 1992, that "small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit."<sup>65</sup> Because of these problems, Congress resolved to consider carefully legislation and regulations "to ensure that small business concerns are not negatively impacted" and to give priority to passage of "legislation and regulations that enhance the viability of small business concerns."<sup>66</sup>

98. Congress also recognized that these funding problems are even more severe for minority and women-owned businesses, who face discrimination in the private lending market. For example, Congress explicitly found that businesses owned by minorities and women have particular difficulties in obtaining capital and that problems encountered by minorities in this regard are "extraordinary."<sup>67</sup> A number of studies also amply support the existence of widespread discrimination against minorities in lending practices. In October, 1992, the year prior to passage of the auction law, the Federal Reserve Bank of Boston released an important and highly-publicized study demonstrating that a black or Hispanic applicant in the Boston area is roughly 60 percent more likely to be denied a mortgage loan than a similarly situated white applicant.<sup>68</sup> The researchers measured every variable mentioned as important in numerous conversations with lenders, underwriters, and examiners and found that minority applicants are more likely to be denied mortgages even where they have the same obligation ratios, credit history, loan to value and property characteristics as white applicants. The lending discrimination that occurs, the study found, does not involve the application of specific rules, but instead occurs where discretionary decisions are made. Based on the Boston study, it is reasonable to expect that race would affect business loans that are based on more subjective criteria to an even greater extent than the mortgage loan

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<sup>65</sup> Small Business Credit and Business Opportunity Enhancement Act of 1992, Section 331(a) (3), Pub. Law 102-366, Sept. 4, 1992.

<sup>66</sup> Id., Section 331(b)(2),(3).

<sup>67</sup> Id., Section 112(4); 331(a)(4).

<sup>68</sup> Mortgage Lending in Boston: Interpreting HMDA Data, Federal Reserve Bank of Boston, Working Paper 92-7 (October 1992).

process, which uses more standard rules.

99. Importantly, the Boston study also found that, because most loan applicants have some negative attributes, most loan denials will appear legitimate by some objective standard. Accordingly, the study stated, the lending discrimination that occurs is very difficult to document at the institution level, so legal remedies may be largely ineffective. Indeed, Congress had already attempted to address discriminatory lending practices through laws that bar discrimination in lending, such as the Equal Credit Opportunity Act, enacted in 1974 and amended many times since then. Congress, therefore, could reasonably assume, based on the Boston study, and its legislative experience regarding discriminatory lending practices, that minority applicants for licenses issued in spectrum auctions would face substantial (albeit subtle) barriers to obtaining financing. Any legal remedies, even if effective, would, moreover, come too late to ensure that minorities are able to participate in spectrum auctions and obtain licenses.

100. Similar evidence presented in testimony before the House Minority Enterprise Subcommittee on May 20, 1994 indicates that African American business borrowers have difficulty raising capital mainly because they have less equity to invest, they receive fewer loan dollars per dollar of equity investment, and they are less likely to have alternate loan sources, such as affluent family or friends. Assuming two hypothetical college educated, similarly-situated male entrepreneurs, one black, one white, the testimony indicated that the white candidate would have access to \$1.85 in bank loans for each dollar of owner equity invested, while the black candidate would have access to only \$1.16. According to the testimony, the problems associated with lower incomes and intergenerational wealth, as well as the discriminatory treatment minorities receive from financial institutions, make it much more likely that minorities will be shut out of capital intensive industries, such as telecommunications. This testimony also noted that African American representation in communications is so low that it was not possible to generate meaningful summary statistics on underrepresentation.<sup>69</sup>

101. The inability to access capital is also a major impediment to the successful participation of women in broadband PCS auctions. In enacting the Women's Business Ownership Act in 1988, Congress made findings that women, as a group, are subject to discrimination that adversely affects their ability to raise or secure capital.<sup>70</sup> As AWRT

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<sup>69</sup> Testimony of Dr. Timothy Bates, Visiting Fellow, The Woodrow Wilson Center, before the U.S. House of Representatives Committee on Small Business, Subcommittee on Minority Enterprise, Finance, and Urban Development (House Minority Enterprise Subcommittee), May 20, 1994.

<sup>70</sup> Pub. L. 100-533 (1988). In 1991, Congress enacted the Women's Business Development Act of 1991 to further assist the development of small businesses owned by women. See Pub. L. 102-191 (1991).

documents, these discriminatory barriers still exist today. Indeed, AWRT reports that while venture capital is an important source of funding for telecommunications companies, women-owned companies received only approximately one percent of the \$3 billion invested by institutional venture capitalists in 1993. Citing a 1992 National Women's Business Council report, AWRT further argues that even successful women-owned companies did not overcome these financing obstacles after they had reached a level of funding and profitability adequate for most other businesses.<sup>71</sup>

102. A study prepared in 1993 by the National Foundation for Women Business Owners (NFWBO) further illustrates the barriers faced by women-owned businesses. For example, it finds that women-owned firms are 22 percent more likely to report problems dealing with their banks than are businesses at large. In addition, the NFWBO study finds that the largest single type of short-term financing used by women business owners is credit cards and that over half of women-owned firms use credit cards for such purposes, as compared to 18 percent of all small to medium-sized businesses, which generally use bank loans and vendor credit for short-term credit needs. With regard to long-term financing, the study states that a greater proportion of women-owned firms are turning, or are forced to turn, to private sources, and to a wider variety of sources, to fulfill their needs. Based on these findings, the NFWBO study concludes that removal of financial barriers would encourage stronger growth among women-owned businesses, resulting in much greater growth throughout the economy.<sup>72</sup>

103. If we are to meet the congressional goals of promoting economic opportunity and competition by disseminating licenses among a wide variety of providers, we must find ways to counteract these barriers to entry. Over the years, both Congress and the Commission have tried various methods to enhance access to the broadcast and cable industries by minorities and women. For example, in the late 1960s, the FCC began to promote nondiscriminatory employment policies by broadcast licensees. These equal employment opportunity efforts have taken the form of Commission rules and policies that require licensees not to discriminate, to report hiring and promotion statistics, and to implement affirmative action programs.<sup>73</sup> The Commission also has adopted similar equal employment rules for licensees in the common carrier, public mobile, and international fixed

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<sup>71</sup> See Letter of AWRT to the Honorable Kweisi Mfume, Chairman, House Minority Enterprise Subcommittee, June 1, 1994.

<sup>72</sup> See The National Foundation for Women Business Owners, *Financing the Business*, A Report on Financial Issues from the 1992 Biennial Membership Survey of Women Business Owners, October 1993.

<sup>73</sup> 47 C.F.R. § 73.2080 (broadcasters must "establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of the station's employment policy and practice").

public radio communication services,<sup>74</sup> as well for cable operators.<sup>75</sup> The cable EEO rules were recently revised as part of the implementation of the Cable Act of 1992, and they now apply to cable entities, satellite master antenna television operators serving 50 or more subscribers and any multichannel video programming distributor.<sup>76</sup>

104. A decade after it first addressed discriminatory hiring practices, the Commission began to look into the serious underrepresentation of minorities among owners of broadcast stations. Recognizing that it could play an important role in alleviating this problem through the licensing process, the Commission adopted its tax certificate and distress sale policies in 1978 to encourage minority ownership of broadcast facilities.<sup>77</sup> It noted that full minority participation in the ownership and management of broadcast facilities would result in a more diverse selection of programming and would inevitably enhance the diversity of control of a valuable resource, the electromagnetic spectrum.<sup>78</sup>

105. In implementing these ownership policies, the Commission identified lack of access to capital as one of the principal barriers to minority entry. Thus, in 1981, the Commission created the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications (the "Rivera Committee") to investigate financing methods and to give recommendations to the FCC on ways to encourage minority ownership of telecommunications facilities.<sup>79</sup> The Rivera Committee confirmed that the shortage of

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<sup>74</sup> 47 C.F.R. §§ 21.307, 22.307, 23.55.

<sup>75</sup> 47 C.F.R. §§ 76.71-76.79.

<sup>76</sup> See 47 U.S.C. § 554. In addition, the Commission has proposed adopting EEO requirements for all CMRS licensees, including PCS licensees. Regulatory Treatment of Mobile Services, Further Notice of Proposed Rule Making, GN Docket 93-252, FCC 94-100 (released May 20, 1994).

<sup>77</sup> See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC 2d 849 (1982) (1982 Policy Statement); see also Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979 (1978) (1978 Policy Statement).

<sup>78</sup> Because of the role of cable television systems in retransmitting broadcast signals, the Commission has also issued tax certificates in connection with sales of cable systems. See Statement of Policy on Minority Ownership of CATV Systems, FCC 82-524, released December 22, 1982.

<sup>79</sup> Strategies for Advancing Minority Ownership Opportunities in Telecommunications, The Final Report of the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications to the Federal Communications Commission, May 1982 (Rivera Committee Report).

capital is a principal problem facing minorities seeking ownership opportunities and further found that this shortage was due to minority inexperience in obtaining financing, financial institution misconceptions about potential minority borrowers, and marketplace structural problems, such as high interest rates and low broadcast industry earnings growth. Among other things, the Rivera Committee suggested educational and outreach programs and expanding the tax certificate program to nonbroadcast properties such as common carrier and land mobile. In response to this recommendation, the FCC submitted draft legislation to Congress proposing to broaden the scope of the Commission's authority to issue tax certificates in connection with the sale or exchange of any type of telecommunications facilities.<sup>80</sup> On March 24, 1983, The Minority Telecommunications Ownership Tax Act of 1983, H.R. 2331, which incorporated the Commission's proposals, was introduced in the House of Representatives.<sup>81</sup>

106. Congress also took steps to address the problem of minority underrepresentation in communications. In 1982, it mandated the grant of a "significant preference" to minority applicants participating in lotteries for spectrum-based services. 47 U.S.C. § 309(i)(3)(A). And, in 1988 and each fiscal year thereafter, Congress attached a provision to the FCC appropriations legislation, which precluded the Commission from spending any appropriated funds to examine or change its minority broadcast preference policies.<sup>82</sup>

107. These efforts have met with limited success. The record shows that women and minorities have not gained substantial ownership representation in either the broadcast or non-broadcast telecommunications industries. For example, a 1993 report conducted by the National Telecommunications and Information Administration's (NTIA) Minority Telecommunications Development Program shows that, as of August 1993, only 2.7 percent of commercial broadcast stations were owned by minorities. Another study commissioned by the Commerce Department's Minority Business Development Agency in 1991 found that only one half of one percent of the telecommunications firms in the country were minority owned. The study also identified only 15 minority cable operators and 11 minority firms engaged in the delivery of cellular, specialized mobile radio, radio paging or messaging services in the

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<sup>80</sup> See Federal Communications Draft Legislation Revising Section 1071 of the Internal Revenue Code of 1954 (January 17, 1983).

<sup>81</sup> The Minority Telecommunications Ownership Tax Act of 1983, H.R. 2331, 98th Congress, 1st Sess., March 24, 1983.

<sup>82</sup> See Continuing Appropriations Act for Fiscal Year 1988, Pub. L. 100-102, 101 Stat. 1329-31; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1994, Pub. L. 103-121, 107 Stat. 1167.

United States.<sup>83</sup> And, according to the last available U.S. Census, only 24 percent of the communications firms in the country were owned by women, and these women-owned firms generated only approximately 8.7 percent of the revenues earned by communications companies.<sup>84</sup> When companies without paid employees are removed from the equation, firms with women owners represent only 14.5 percent of the communications companies in the country.<sup>85</sup> One result of these low numbers is that there are very few minority or women-owned businesses that bring experience or infrastructure to PCS. They thus face an additional barrier relative to many existing service providers.

108. Small businesses also have not become major participants in the telecommunications industry. For instance, one commenter asserts that ten large companies -- six Regional Bell Operating Companies (RBOCs), AirTouch (formerly owned by Pacific Telesis), McCaw, GTE and Sprint -- control nearly 86 percent of the cellular industry. This commenter further contends that nine of these ten companies control 95 percent of the cellular licenses and population in the 50 BTAs that have one million or more people.<sup>86</sup>

109. Congress directed the Commission to ensure that, together with other designated entities, rural telephone companies have the opportunity to participate in the provision of PCS. Rural areas, because of their more dispersed populations, tend to be less profitable to serve than more densely populated urban areas. Therefore, service to these areas may not be a priority for many PCS licensees. Rural telephone companies, however, are well positioned because of their existing infrastructure to serve these areas profitably. We, therefore, have adopted special provisions to encourage their participation, increasing the likelihood of rapid introduction of service to rural areas.

110. In the new auction law, Congress directed the Commission to remedy this

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<sup>83</sup> See Testimony of Larry Irving, Assistant Secretary for Communications and Information, U.S. Department of Commerce, before the House Minority Enterprise Subcommittee, May 20, 1994. In his testimony at this same hearing, FCC Chairman Reed Hundt cited some of these statistics and noted that in light of this serious underrepresentation, there remains "a fundamental obligation for both Congress and the FCC to examine new and creative ways to ensure minority opportunity." Testimony of Reed E. Hundt, Chairman, Federal Communications Commission, before the House Minority Enterprise Subcommittee, May 20, 1994.

<sup>84</sup> See Women-Owned Businesses, 1987 Economic Censuses, U.S. Department of Commerce, issued August 1990, at 7, 147. The census data includes partnerships, and subchapter S corporations. We have no statistics regarding women representation among owners of larger communications companies.

<sup>85</sup> Id.

<sup>86</sup> Ex parte filing of DCR Communications, May 31, 1994.

serious imbalance in the participation by certain groups, especially minorities and women. The record indicates that, in the absence of meaningful efforts to assist designated entities, there would be good reason to think that participation by these groups, particularly businesses owned by women and minorities, would continue to be severely limited. Indeed, the auction law itself envisions a process that requires payment of funds to acquire an initial license, unlike existing licensing methods such as comparative hearings or lotteries. It is therefore possible that participation by those with limited access to capital could be further diminished by operation of the statute, absent affirmative provisions to create competitive opportunity for designated entities. The measures we adopt in this Fifth Report and Order thus will carry out Congress's directive to provide meaningful opportunities for small entities, rural telephone companies, and businesses owned by women and minorities to provide broadband PCS services. The rules also are expressly designed to address the funding problems that face these groups and that are their principal barriers to entry.

111. We also intend that designated entities who win licenses have the opportunity to become strong competitors in this service. While the new broadband PCS service presents tremendous opportunities for designated entities to participate in the provision of the next generation of innovative wireless mobile telecommunications services, it is expected to be a highly competitive service, and the estimated costs of acquiring a license and constructing facilities are substantial. In the Broadband PCS Reconsideration Order, which was adopted June 9, 1994, we took specific steps to assist designated entities to become viable competitors in the provision of broadband PCS. For example, we modified the PCS spectrum allocation plan by shifting all channels blocks to a contiguous lower segment of the "emerging technologies band" in part to bolster the ability of designated entities to obtain more competitively viable licenses. In addition, we relaxed some of the ownership and attribution rules with respect to cellular operators' participation in PCS to foster investment in designated entity ventures,<sup>87</sup> and we also relaxed the PCS/cellular cross-ownership rule for designated entities with cellular holdings to allow them to further expand their opportunities in broadband PCS.<sup>88</sup> Further, we took steps that will result in lower capital costs for designated entities that obtain PCS licenses, including adoption of a band plan that will reduce the costs of clearing the PCS spectrum of incumbent microwave users as well as relaxing the construction requirements.

112. The measures we establish today to encourage the entry of designated entities also are designed to promote strong, long-term bona fide competitors. For example, we have revised the definition of a small business set forth in the Second Report and Order to include entities with up to \$40 million in gross revenues, and we will allow these small businesses to pool their resources and form consortia to bid in the entrepreneurs' blocks. We also adopt rules that allow entrepreneurial businesses, small businesses, and businesses owned by women

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<sup>87</sup> Broadband PCS Reconsideration Order at ¶127.

<sup>88</sup> Id. at ¶125.

and minorities to raise capital by attracting passive equity investors. At the same time, we have designed these rules to ensure that the special provisions adopted for such businesses accrue to the intended beneficiaries.

## **B. Summary of Special Provisions for Designated Entities**

113. As discussed more fully below, many commenters in this proceeding believe that the inability of designated entities to obtain adequate funding has a profoundly adverse effect on the potential for these businesses to bid successfully in auctions against very large, established businesses. Therefore, we take a number of steps in this Order to help address this imbalance.

- We establish two "entrepreneurs' blocks" (frequency blocks C and F) in which large companies (those with \$125 million or more in annual gross revenues or \$500 million or more in total assets) will be prohibited from bidding.
- Bidding credits will be granted both to small businesses and to businesses owned by women and minorities in the entrepreneurs' blocks to provide them with a better opportunity to compete successfully in broadband PCS auctions.
- Certain winning bidders in frequency blocks C and F will be permitted to pay the license price in installments, and the interest rate and moratorium on principal payments will be adjusted to assist small businesses and women and minority-owned businesses.
- We adopt a tax certificate program for minority and women-owned businesses, which will provide additional assistance in their efforts to attract equity investors.
- Rural telephone companies will be allowed to obtain broadband PCS licenses that are geographically partitioned from larger PCS service areas to provide them more flexibility to serve rural subscribers.<sup>89</sup>
- Bidders in the entrepreneurs' blocks will be required to pay an upfront payment of only \$0.015 per MHz per pop, in contrast to the \$0.02 per MHz per pop required in the other blocks.

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<sup>89</sup> In a Further Notice of Proposed Rule Making in this docket, we will seek comment on whether a partitioning option for small businesses or businesses owned by women or minorities, as suggested by some of the commenters, may be appropriate. In that Further Notice, we also will seek comment on whether the Commission should impose a restriction on the assignment or transfer of control of partitioned licenses by rural telephone companies or other designated entities for some period of time.



114. The following chart highlights the major provisions adopted for businesses bidding in the entrepreneurs' blocks.<sup>90</sup>

	<u>Bidding Credits</u>	<u>Installment Payments</u>	<u>Tax Certificates for Investors</u>
Entrepreneurial Businesses (\$40 MM - \$125 MM in revenue and less than \$500 MM in total assets)	0	Interest only for 1 year; rate equal to 10-year Treasury note plus 2.5%; (for businesses with revenues greater than \$75 MM, available only in top 50 markets)	No
Small Businesses (less than \$40 MM revenues)	10%	Interest only for 2 years; rate equal to 10-year Treasury note plus 2.5%;	No
Businesses Owned by Minorities and/or Women (\$40 MM - \$125 MM in revenues)	15%	Interest only for 3 years; rate equal to 10-year Treasury note;	Yes
Small Businesses Owned by Minorities and/or Women (less than \$40 MM revenues)	25%	Interest only for 5 years; rate equal to 10-year treasury note;	Yes

### C. Summary of Eligibility Requirements and Definitions

#### 1. Entrepreneurs' Blocks and Small Business Eligibility

115. The following points summarize the principal rules regarding eligibility to bid in the entrepreneurs' blocks and to qualify as a small business. In addition, they summarize the attribution rules we will use to assess whether an applicant satisfies the various financial thresholds. More precise details are discussed in the subsections that follow.

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<sup>90</sup> This table is not comprehensive and therefore it does not present all the provisions established for designated entities, especially those available outside the entrepreneurs' blocks.